

OPEN GOVERNMENT 101

Department of Attorney General
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Hosted by the Community College of Rhode Island



Why Is Open Government Training Important?



ROLE OF THE ATTORNEY GENERAL



ACCESS TO PUBLIC RECORDS

APRA
R.I.G.L. § 38-2-1, et. seq.

APRA v. FOIA

- Freedom of Information Act
5 U.S.C. § 552

The Purpose

"The purpose of this chapter is to facilitate public access to public records. It is also the intent of this chapter to protect from disclosure information . . . [that] would constitute an unwarranted invasion of personal privacy."
R.I.G.L. § 38-2-1

Does APRA apply?

- Is this a public body?
 - Any agency of state or local government
 - Any public or private entity acting on behalf of any public agency

R.I.G.L. § 38-2-2(1)

Does APRA apply?

- Is this a “public record”?
- *R.I.G.L. § 38-2-2(4)(i), et. seq.*

Procedural Requirements

Procedural Requirements

- *R.I.G.L. § 38-2-3 (c) mandates that each public body “shall establish procedures regarding access to public records”*
- *Of the 16 violations issued in 2008, 12 had procedural violations*

Procedural Requirements

- A public body shall *not require written* requests for:
 - Public information available pursuant to R.I.G.L § 42-35-2, the APA
 - Other documents prepared for or readily available to the public
- R.I.G.L. § 38-2-3(c)*

Procedure – Time to Respond

- Within ten (10) business days of an APRA request, the public body must respond
- Response must be in writing
 - R.I. Gen. Laws § 38-2-7(b)

Procedure – How to Respond

- n Provide access to the requested documents
- n Extending the time to respond for “good cause”
- n Denying access to the requested documents

Procedure - Prior to Providing Records

- provide estimate of charges, and
- upon request, detailed itemization of search/retrieval costs, and
- perform search/retrieval within reasonable amount of time, and
- provide reduction or waiver of search/retrieval costs upon a court order

R.I.G.L. § 38-2-4

Procedure – How to Extend Time

- n In writing
- n For good cause
- n For up to an additional 20 business days

R.I. Gen. Laws § 38-2-7(c)

Procedure – Denial

- n In writing
- n Must state specific reason
- n Appeal procedure

R.I. Gen. Laws § 38-2-7(a)

Procedure – What If The Document Does Not Exist?

- n Must respond even if do not have record
- n Campbell v. Coastal Resources Management Council, PR 08-33

R.I. Gen. Laws § 38-2-3(f)

Who Has the Right to Request?

- n Commercial purposes?
- n R.I. Gen. Laws § 38-2-3(a)&(h)
- n R.I. Gen. Laws § 38-2-6
“to solicit for commercial purposes”
- n Rhode Island Association of Realtors, Inc. v. Whitehouse, 199 F.3d 26 (1st Cir. 1999)

Right to Request

- What if the requestor is the subject of the document?

Specificity of Request

- n How specific/non-specific can a request be?
- n Responsibility on requestor
- n Assassination Archives and Research v. Central Intelligence Agency, 720 F.Supp. 217 (D. D.C. 1989)
- n Records, not questions
- n No magic words

Right to Inspect

- n "inspect and/or copy"
R.I.G.L. § 38-2-3(a)
- n PR 08-35: Ambeault (2) v. Lincoln School Department

Fees

- \$.15 per photocopy on common/legal size paper
- \$15.00 per search/retrieval hour, no charge for the first hour
- No more than the actual reasonable cost for providing electronic records

R.I.G.L. § 38-2-4

APRA Substantive Provisions

What Is Public?

Every record shall be public unless:

1. It is exempt under one of the twenty-five categories;
- or
2. It fails the Balancing Test

The Exemptions:
R.I.G.L. § 38-2-2(i)(A)- (Y)

- Exempt, but not prohibited

The Exemptions:
R.I.G.L. § 38-2-2(i)(A)(I)

- All records which are identifiable to an individual applicant for benefits, client, patient, student, or employee;
- and all personal or medical information relating to an individual in any files

R.I.G.L. § 38-2-2(i)(A)(I)

- Third clause – 14 categories of information public even though they are identifiable to an individual

Exemptions

- If the individual affected is no longer a town employee does (A)(I) no longer apply?

What If a Portion of the Document Is Exempt?

- The APRA gives a duty to redact what is not public and provide those parts that are public.

R.I.G.L. § 38-2-2(4)

- Newport Daily News v. Town of Middletown

R.I.G.L. § 38-2-2(i)(K)

- Preliminary drafts, notes, impressions, memoranda, working papers, and work products
- Exception: Documents submitted at a public meeting shall be deemed public

R.I.G.L. § 38-2-2(i)(M)

- Correspondence of/to elected officials in their official capacity

R.I.G.L. § 38-2-2(i)(S)

- Records required to be kept confidential by law, regulation or rule of court

Balancing Test

- Does the *privacy interest* of the individual outweigh the *public's interest* in disclosure
- Case by Case basis

Balancing Test

- If exempt, NO balancing test
- "arises only after a record has first been determined to be a public record"

Settlement Agreements

- "settlement agreements of any legal claims against a governmental entity shall be deemed public record"
- Confidentiality clauses do not trump APRA

R.I.G.L. § 38-2-14

Remedies Available

- Appeal the decision pursuant to the process set forth in the denial
- file a complaint with the Department of the Attorney General
- file a complaint in the Superior Court

R.I.G.L. § 38-2-8

Penalties

- \$1000 fine for knowing and willful violation
- Reasonable attorney's fees and costs
- Documents provided at no cost

R.I.G.L. § 38-2-9(d)

Department of Attorney General Procedures

- Contact person
- Regular business hours of the records department and what to do if you come in after that time
- Statement that it is not required to provide identification or the reason the information is sought
- How to obtain an AG APRA request form
- Time frame and notice of appeal

Example Request for Department of Attorney General

Dear Laura Marasco:

- Time sheets/money paid to law firm and also description of services rendered
- Arbitration decision of former employee
- Current salary and starting salary of John Smith
- Resumes of all applicants for job of assistant
- Home addresses of all employees

Open Meetings Act

OMA

R.I.G.L. § 42-46-1, et. seq.

Misconceptions About the OMA

- The public bodies own rules or by-laws, town charters
- Robert's Rules of Order
- Disclosure by members of what happened in closed session
- Application of OMA to individual v. general public

Purpose: *R.I.G.L. § 42-46-1*

"that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions"

Does the OMA Apply?

Three things for the OMA to apply:

1. Public Body
2. Quorum
3. Meeting

What Is a Public Body?

"any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government"

R.I.G.L. § 42-46-2(c)

What Is Not a Public Body?

- any political party, organization, or unit thereof meeting or convening is not and should not be considered to be a public body
- however no such meeting shall be used to circumvent the requirements of this chapter

R.I.G.L. § 42-46-2(c)

What About Sub-committees?

Sub-committees and advisory committees ARE public bodies and are subject to all of the rules of the OMA.

What Is a Meeting?

A meeting is the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

R.I.G.L. § 42-46-2(a)

What is a meeting?

Meetings under the OMA expressly include, without limiting the generality of the foregoing, so-called "workshop," "working," or "work" sessions.

R.I.G.L. § 42-46-2(a)

What Is a Quorum?

Unless otherwise defined by the public body a quorum is a simple majority of the members.

R.I.G.L. § 42-46-2(d)

What Is a Quorum?

- n Does a quorum mean the members must be physically present together?
- n 'rolling' or 'walking' quorum

Email/Telephone

- n Can a public body use email or telephone conferencing?
- n 42-46-5(b): No meeting of members of a public body or use of electronic communication, shall be used to circumvent the spirit or requirements of this chapter.

Email/Telephone

- n Email may be used for scheduling
- n A member of a public body may participate by use of electronic communication or telephone communication if:
 - on active duty
 - has a disability and cannot otherwise participate

R.I.G.L. § 42-46-5(b)

Open Meeting

- n The OMA mandates that every meeting of a public body *shall* be open to the public.

R.I.G.L. § 42-46-3
- n Always be open?

R.I.G.L. § 42-46-4

Closed Meetings

- n Who may attend?

Closed Meetings: Purposes

- The "personnel" exception.
R.I.G.L. § 42-46-5(a)(1)
- Discussions of job performance, character, or physical or mental health of a person or person.
 - Advanced written notice that discussion may take place in open session
 - State in open call and minutes notice provided

Purposes for Closed: R.I.G.L. § 42-46-5(a)(1)

- What can be discussed?
- What cannot be discussed?
- What if there are multiple people and only some want it to be open?

Purposes for Closed Session

Sessions or work sessions pertaining to collective bargaining or litigation

R.I.G.L. § 42-46-5(a)(2)

Purposes for Closed Session

- Investigative proceedings regarding allegations of civil or criminal misconduct

R.I.G.L. § 42-46-5(a)(4)

Purposes for Closed Session

- School Committee sessions to conduct student disciplinary hearings or to review other matters relating to the privacy of students or their records
 - Advanced written notice that discussion may take place in open session
 - State in open call and open minutes notice provided

R.I.G.L. § 42-46-5(a)(8)

Procedure: Annual Notice

- Annual Notice
 - What must annual notice contain?
 - Where must it be posted?

R.I.G.L. § 42-46-6(a)

Procedure: Annual Notice

- n What if the public body does not have regularly scheduled meetings?

Procedure: Supplemental Notice

- n 48 hours before meeting
 - n What must supplemental notice contain?
 - n Date
 - n Time/location
 - n Date posted
 - n Statement specifying business to be discussed
- R.I.G.L. § 42-46-6(b)*

Procedure: Supplemental Notice

- n When must supplemental notice be posted?
- n Where?
- n What about School Committees?
 - n School Committee sub committees

Supplemental Notice

- n What must the statement specifying the nature of the business to be discussed consist of?
 - n Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784 (R.I. 2005)

How Detailed Must the Agenda Be?

- n Must each matter be listed?
- n What about sub-committee agendas?
- n Does newspaper/secretary of state site agenda need to be same as used at meeting?
- n What about Executive Session
 - n Each matter?
 - n How specific?

Agenda

There will be a meeting of the Public Body on Wednesday, January 14, 2009 at 2:30 p.m.

1. Discussion and approval of minutes of the last meeting.
2. Old Business
3. Discussion of changes to by-laws
4. Executive Session
 1. Personnel – 2 matters
 2. 42-46-5(a)(2) litigation matter

Agenda

- n Discussing matters not on the agenda
- n Majority vote
- n Informational purposes only and may not be voted on except:
 - Emergency
 - Refer matter to another committee/person

R.I.G.L. § 42-46-6(b)

Amending Agenda

- n What if you are a school body?
 - n Posted within 48 hours of meeting at:
 - The 2 public locations
 - Secretary of State
 - School district's website
 - n Amended items unexpected and could not have been added for newspaper publication
 - n State for record and minutes why agenda items could not have been added in newspaper and need to be addressed at this meeting

R.I.G.L. § 42-46-6(e)

Amending Agenda

- n School Committee continued
 - n Process available to provide timely notice to:
 - Any person who has requested
 - Reasonable steps to make public aware
 - n Original notice indicate that changes will be:
 - Posted on website
 - Posted in 2 locations
 - Filed with Secretary of State

How to Go Into Closed Session

- n "Open Call"
 - n Majority Vote in open session
 - n Recorded in minutes
 - n State in open session and in minutes the subsection of § 42-46-5
 - n State in open session and in minutes a statement of the business to be discussed

R.I.G.L. § 42-46-4

Closed Session

- n Can other matters be discussed in executive session?

Closed Session Votes

- n Can you vote in executive session?
- n Disclosure of votes taken in closed session
 - n Must all votes be disclosed?

Open Session Minutes

- Open session minutes must contain:
 - date, time, and place of the meeting
 - members who are absent/present
 - record by individual member of any vote(s) taken
 - any other relevant information that a member of the public body requests

R.I.G.L. § 42-46-7

Minutes

- When must be made available?
 - Approval of minutes v. drafts
- What about closed session minutes?

R.I.G.L. § 42-46-7(b)

R.I.G.L. § 42-46-7(c)

Open Forum/Public Comment

- What?
- Required?
- Need to respond?
- Limit comments?

R.I.G.L. § 42-46-6(d)

Open Forum/Public Comment

- What about for school committees?

R.I.G.L. § 42-46-6(b)

Remedies

- File an action with the Superior Court
- File a complaint with the Department of Attorney General.

R.I.G.L. § 42-46-8

Penalties

- Injunctive relief and declare actions null and void
- Civil fine up to \$5,000 for a willful and knowing violation
- Attorney's fees and costs

R.I.G.L. § 42-46-8(d)

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